No. 13046

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT CARL GETLIN, Administrator of the Estate of CORINNE CONSTANCE GETLIN, Deceased,

Appellant,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS OF JURISDICTION

This is a cause on appeal from the United States District Court for the District of Oregon. It is an action in which plaintiff seeks to recover the sum of $5,053.60, together with interest thereon from appellee. Appellant recovered judgment in the Circuit Court of the State of

Oregon for the County of Multnomah against appellee's insured (Tr. 32). Appellee refused to pay the judgment, and appellant brought the present action in the United States District Court for the District of Oregon to effect collection.

The appellant is a citizen of the State of Oregon and appellee is a citizen of the State of Maryland (Tr. 6, 54); the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000 (Tr. 6).

The action was filed in the United States District Court for the District of Oregon pursuant to 28 U.S.C.A. Sec. 1332 (Tr. 6).

This court has appellate jurisdiction to review this cause by virtue of 28 U.S.C.A. Section 1291.

The documents showing the existence of jurisdiction are the complaint (Tr. 3), Answer (Tr. 7), Pre-trial Order (Tr. 14), and Findings of Fact and Conclusions of Law (Tr. 54).

STATEMENT OF THE CASE

This cause arises out of an automobile accident in which appellant's decedent was fatally injured on October 31, 1947. Decedent was employed by one Harold M. Kalahar as a magazine salesman. The employer furnished transportation from city to city and the accident occurred near Boardman, Oregon, while the vehicle was being driven by one Phillip Rodgers, a co-employee.

Appellant brought an action pursuant to the Oregon wrongful death statute against both Kalahar and Rodgers in the Circuit Court of the State of Oregon for the County of Multnomah. This case resulted in a verdict and judgment against both defendants in the sum of $5,000, together with costs in the sum of $153.60.

Defendant Kalahar carried a policy of indemnity insurance with appellee, Maryland Casualty Company. Appellee refused to pay the judgment rendered in the State Court case and appellant filed the present action in the United States District Court for the District of Oregon to effect collection. When the cause came on for pre-trial it was stipulated that appellee's policy did not cover a judgment rendered against the defendant Phillip Rodgers (Tr. 20). There was no dispute between the respective parties as to the facts involved, and the matter was submitted to the Court on a stipulated statement of facts (Tr. 14). The only issue submitted to the Court for its determination was whether or not at the time of the death of decedent she was "engaged in the employment of the insured Kalahar within the meaning of the policy" (Tr. 20). The trial court found that decedent was so engaged at the time of her death. It further found that this issue was res judicata because of the judgment rendered in the cause in the Circuit Court of the State of Oregon for the County of Multnomah (Tr. 60).

Final judgment in favor of appellee was entered June 18, 1951 (Tr. 62), and from this judgment appellant now appeals.

SPECIFICATIONS OF ERROR

I.

The trial court erred in concluding that the action brought by appellant in the Circuit Court of the State of Oregon for the County of Multnomah against Rodgers and Kalahar determined that the decedent was "engaged in the employment of the assured" at the time of the fatal accident within the meaning of the policy, and that the issue was res judicata (Conclusions of Law I, Tr. 60), upon the ground and for the reason that there was no issue upon this point in the State Court case.

II.

The trial court erred in concluding that at the time of the fatal accident decedent was an employee "engaged in the employment of the insured" Kalahar within the meaning of the exclusionary clause (Conclusions of Law II, Tr. 60), contained in Kalahar's liability policy, for the reason that an employee is never "engaged" in the employment within the meaning of such an exclusionary clause unless the employee is actively performing some duty on behalf of the employer.

III.

The trial court erred in concluding that the liability of the insured Kalahar to appellant was not covered by an automobile public liability policy issued by appellee to Kalahar (Conclusions of Law III, Tr. 61), for the reason that the exclusionary clause did not apply to plaintiff's decedent under the factual situation presented to the court.

IV.

The Findings of Fact do not support the trial court's Conclusions of Law and Judgment for the reason that under the facts as stipulated it was contrary to law for the court to conclude that the issue of whether or not decedent was "engaged in the employment" of the assured was res judicata, or to conclude that in any event decedent was so "engaged."

SUMMARY OF ARGUMENT

Appellant's contentions are as follows:

I.

The trial court erred in concluding that the issue of whether or not appellant's decedent was engaged in the employment was res judicata for the reason (a) there was no issue concerning whether or not the decedent was so engaged in the State Court trial, and (b) no such finding was necessary to support the State Court judgment.

II.

Appellant earnestly contends that under practically all the reported cases, and particularly under the decisions of the State of Oregon, it is contrary to law for the Court to conclude that decedent was "engaged in the employment" of the insured, Kalahar, at the time of the fatal accident.

III.

The trial court was in error in concluding that the liability of the insured Kalahar to appellant was not

covered by appellee's liability policy, since the exclusionary clause (Tr. 61) could not apply to the decedent under the factual situation as decedent was not actually engaged in performing any duty for her employer.

IV.

Appellant is entitled to judgment in accordance with the prayer of his complaint (Tr. 6).

FIRST SPECIFICATION OF ERROR

The trial court erred in concluding that the action brought by appellant in the Circuit Court of the State of Oregon for the County of Multnomah against Rodgers and Kalahar determined that the decedent was "engaged in the employment of the assured" at the time of the fatal accident within the meaning of the policy, and that the issue was res judicata (Conclusions of Law No. I, Tr. 60), upon the ground and for the reason that there was no issue upon this point in the State Court case.

ARGUMENT

In the State Court case appellant alleged that at all times mentioned decedent was "employed by defendant Harold M. Kalahar" (Tr. 37). Appellant further alleged that defendant Kalahar furnished a driver to transport decedent and her co-employees from place to place (Tr. 37). To these allegations the defendant Kalahar filed a general denial (Tr. 34), denying each

and every allegation, and thus the relationship of decedent to the defendant Kalahar became an issue.

The State Court judge, in instructing the jury, instructed as follows:

> "I instruct you that before you can bring in any verdict in this case against the individual defendant Harold M. Kalahar you must also find that the defendant Philip Rodgers was an employee of the defendant Kalahar and also that the decedent, Corinne Constance Getlin, was also an employee of the defendant Kalahar as I shall later define that relationship to you.
>
> "You are instructed that in determining whether or not the decedent, Corinne Constance Getlin, and the defendant Philip Rodgers were employees of the defendant Harold M. Kalahar, the test as to the existence of the relationship is whether there is an understanding between the parties that one is to render personal services to or for the benefit of the other and recognition by them of the right of Harold M. Kalahar to order and control the other in the performance of the work and to direct the manner and method of its performance." (Tr. 19)

It is perfectly obvious from reading the foregoing instruction that the issue the instruction was meant to cover was whether or not the decedent and Rodgers were "employees" at the time of the accident. The obvious reason for the allegation in the complaint to the effect that they were employees was to obviate the necessity of proving gross negligence under the Oregon guest statute. Appellee, in its trial brief, contended that decedent's status at the time of her death was a very material issue in the State Court trial. With this contention, of course the appellant agreed and now agrees.

Appellant contended that "the relationship" of decedent to Kalahar at the time of her death was controlling. Appellee argued that whether she met the test of an "employee" the day before, or the week before her death, was immaterial.

Of course the appellant does not deny appellee's contentions in this regard. Indeed appellant alleged in the original action (Tr. 37) that decedent was an "employee." Appellant earnestly contends that there is nothing in the pleadings in the State Court action, or in the Court's instructions, which would even remotely touch the question at issue here, namely: Was decedent "engaged in the employment of the insured" Kalahar at the time of her death within the meaning of the policy (Tr. 20)?

Appellee has contended in the District Court that the legal theory upon which Kalahar's liability was predicated in the State Court of necessity encompassed the determination of the employer-employee relationship. Appellee contended that the mere relationship of employer-employee is not sufficient to hold an employer under the theory of respondeat superior, but that in addition it must be shown that *the employee* was engaged within the scope of his employment.

Of course at this point it becomes material to reexamine the facts and determine which employee appellee was and is referring to. In the State Court action of course appellant was attempting to hold defendant Kalahar responsible because of the negligent acts of his agent, Rodgers. In regard to Rodgers, we quote from the instructions, as follows:

"With respect to the defendant Kalahar, you are instructed that the defendant Kalahar would be liable to plaintiff in damages for the negligent acts, if any, of the defendant Rodgers only if you find from a preponderance of the evidence that the defendant Rodgers was at the time of the accident driving the car in which the decedent was riding by authority of and at the express direction of the defendant Kalahar. That is to say, Kalahar would be liable for Rodgers' negligent acts, if any, only if Rodgers was at the time serving as relief driver pursuant to a prior request so to serve made by the defendant Kalahar, and provided further that if employed by Kalahar the decedent, pursuant to the terms and conditions of her employment, *was not permitted to participate in or direct the operation of or exercise control over the operation of the car in which she at the time was riding.*" (Italics ours) (Appellee's Exhibit E, Tr. 23)

Rodgers was driving the car at the time of the fatal accident. The court required the jury to find that he was so driving "by authority of and at the express direction of defendant Kalahar." The court further required the jury to find that decedent "WAS NOT PERMITTED TO PARTICIPATE IN OR DIRECT THE OPERATION OF OR EXERCISE CONTROL OVER THE OPERATION OF THE CAR IN WHICH SHE WAS AT THE TIME RIDING."

It will thus be seen that the judge in the State Court action made a careful distinction between the status of the deceased employee and the employee Rodgers, although instructing the jury that before they could return a verdict for the plaintiff they must find that "both were employees."

Upon such a state of the record it is difficult for the appellant to conceive how the appellee can even seriously contend that the issue presented in the District Court case is res judicata. Appellee, of course, concedes that insofar as the defendant Rodgers is concerned, he was "engaged in the employment" of the insured at the time of the accident. Indeed, under the court's instructions the jury was required to so find. However, insofar as the deceased employee is concerned, the exact converse is true. With regard to her, the jury was required to find that she was not only a passive rider in the vehicle, but to go even further and find that she was not permitted to participate in, or direct the operation of, or exercise control over the operation of the car.

Let us now turn to an examination of some of the cases and authorities on the question of res judicata.

50 C.J.S., Sec. 598, states the rule of res judicata to be as follows: That before the rule can be invoked there must be identity of parties, of subject matter and of issues.

As to identity of issues, 50 C.J.S., Sec. 830, states the rule.

> "Generally, a plea of res judicata must allege the identity of issues, cause of action and subject matter in the former suit and that the current suit ought to be barred as the result of the prior judgment."

In fact, the general rule seems to be that a plea of res judicata which does not allege identity of issues is demurrable. See *Rigg v. Canterbury,* 116 W. Va. 303,

180 S.E. 182; also *Day v. Weadock,* 114 Fla. 251, 140 S. 668, where it was held that a plea of res judicata is insufficient where it does not show actual judgment on issues sought to be adjudicated.

A reading of the cases will indicate that the courts have been uniformly strict in interpretation of this rule, and that the benefit of an alleged former adjudication cannot be pleaded informally or in general terms or as a mere conclusion of the pleader, but to avail a party in later litigation he must show by his pleadings in the form of quotations or exhibits the complaint and exact character of pleadings in former suits, so that the court, not the pleader, may say *with complete certainty that the issues in the former suit and the later one are precisely the same and that the exact issues sought to be determined in the later case have in fact been decided in the prior one.* See *City of Moundsville v. Brown,* 127 W. Va. 602, 34 S.E. 2d 321.

The rule as set forth in Corpus Juris and in the cases cited above is also the rule in Oregon. In *Taylor v. Taylor,* 54 Or. 560, at 574, after announcing the general rule of res judicata, the court stated:

> "This distinction should also be kept in mind in considering the effect of a former judgment or decree; if the second action or defense is upon the same claim or demand, the former judgment is a bar not only as to matters actually determined, but such as could have been litigated, but if it is upon another claim or demand the former judgment is not a bar *except as to questions actually determined or directly in issue.*" (Italics ours)

In this same case the court quotes with approval from *Caperton v. Schmidt,* 26 Cal. 479:

> "It will be seen from the rule above stated that the matter adjudicated to become as a plea a bar or as evidence conclusive must have been *directly* in issue *and not* merely *collaterally litigated.* It must be a fact immediately found according to the pleadings—not that on which the verdict was merely based—*a fact in issue as distinct from a fact in controversy.*" (Italics ours)

It is manifest that as the rule is thus set forth it could not possibly be applied to the factual situation presented here. In the State Court action there was no direct issue as to whether or not decedent was "engaged in the employment." Neither was this question collaterally litigated, nor was it indeed a fact in controversy. Before the jury could find for plaintiff it was required to find in accordance with plaintiff's complaint that deceased was an employee, and was further required to find that deceased held merely a passive position in the vehicle and was not permitted to participate in, or direct the operation of, or exercise control over the operation of the car.

Under the instructions of the State Court judge, as set forth above, it appears that the jury must have of necessity determined that deceased occupied merely a passive position in the vehicle. If the rule of res judicata can be applied to the present case at all, it would appear that a much stronger argument could be made in favor of the proposition that the issue of whether or not deceased was "engaged in the employment" has been decided to the effect that she was not.

The books are full of cases to indicate that res judicata does not apply unless the particular question was directly in issue, or of necessity could have been litigated in the prior suit. Thus in *Ex parte Landry,* 142 P. 2d 432, a judgment in a prior abandonment proceeding instituted by minor's paternal aunt and uncle against mother was conclusive only of question of abandonment, and was not res judicata on habeas corpus of mother to secure custody of son from aunt and uncle where the question of abandonment was not in issue.

In *Johnson v. Whalen,* 186 Okla. 511, 98 P. 2d 1103, it was held that a judgment in favor of plaintiffs to enjoin obstruction by defendant of driveway between the realty of the parties extending only up to front end of garage was not res judicata of action by defendant in former suit for ouster and to quiet title of strip of land occupied by garage.

This case is an excellent case on this problem, as it goes into the various decisions on the matter and quite clearly sets forth the necessary elements.

A fairly recent Oregon case on the subject is *Watson v. Pacific Mutual Life Insurance Co. of California,* 144 Or. 413, 21 P. 2d 201, 25 P. 2d 162. This was an action on an accident and health policy, wherein it was determined that the insurer waived monthly proofs of continued disability. The insurer contended that this was determinative of its further liability on the question of permanent disability. The court stated:

> "At most the question of permanent incapacity or permanent disability was only a fact in controversy, and not a fact in issue."

It thus appears clear that Oregon adopts the rule that even though a fact is in controversy it does not become res judicata unless actually a fact directly in issue.

In the case of *Southern Oregon Co. v. United States,* 241 F. 16, it was held a suit by the United States to enforce a covenant in a land grant was not barred by the judgments in prior suits relating to certain other lands claimed under the grant, but in which the questions involved in the later suit were not presented or decided.

It would be useless to prolong this brief unduly with numerous citations supporting the foregoing rule. For a few other cases supporting the proposition that res judicata does not apply unless the exact question was directly in issue in the prior action, see *Schumacher v. Industrial Accident Commission,* 46 C.A. 2d 95, 115 P. 2d 571; *Jenkins v. Thomas,* 119 Or. 292, 247 P. 145; *Miner v. Zweifel,* 118 Or. 182, 245 P. 729; *Stark v. Coker,* 20 Cal. 2d 839, 129 P. 2d 390.

We submit that the question involved in the District Court case was not in issue or even in controversy in the State Court action. Neither was a finding that the decedent was "engaged in the employment" necessary to support the verdict in the State Court action. Under this state of the record, we earnestly contend that the trial judge erred in concluding that this issue was res judicata.

SECOND SPECIFICATION OF ERROR

The trial court erred in concluding that at the time of the fatal accident decedent was an employee "engaged in the employment of the insured" Kalahar within the meaning of the exclusionary clause (Conclusion of Law II, Tr. 60), contained in Kalahar's liability policy, for the reason that an employee is never "engaged" in the employment within the meaning of such an exclusionary clause unless the employee is actively performing some duty on behalf of the employer.

ARGUMENT

By the Pre-trial Order (Tr. 20), respective parties stipulated that the only issue to be determined was whether or not decedent was "engaged in the employment of the insured" within the meaning of the policy. Since the appellee set this up as an affirmative defense, it is elementary that the burden of proof in this respect was upon appellee.

There are many cases from many jurisdictions dealing with the relative rights of employees injured while being transported to and from work. The majority of these cases have arisen under situations where the injured party was making a claim under the various Workmen's Compensation Acts.

In most of such cases the statutes (like Section 102-1752, O.C.L.A.) provide compensation for injuries "arising out of and within the course of" employment. Notes

20 A.L.R. 319; 49 A.L.R. 454; 63 A.L.R. 469; 100 A.L.R. 1053; 82 A.L.R. 1043. Obviously questions concerning the compensability of injuries under such statutes can shed little light upon the question of whether these employees were "engaged in the employment of the insured" within the meaning of the exclusion.

It is well settled that Workmen's Compensation Laws receive a liberal interpretation to accomplish their humane purposes, among which is to extend the benefits to as many persons as possible. *Brady v. Oregon Lbr. Co.,* 117 Or. 188; *Bowser v. State Ind. Accident Commission,* 182 Or. 42; *Bundy v. State of Vermont Highway Dept.,* 102 Vt. 84, 146 A. 68. Likewise the Oregon Employers' Liability Act is remedial and receives a liberal interpretation. *Blair v. Western Cedar Co.,* 75 Or. 276; *Dickerson v. Eastern & Western Lbr. Co.,* 79 Or. 281. So that the benefits of the latter statute have been extended to persons who were not in the proximate relation of master and servant with the defendant. *Clayton v. Enterprise Electric Co.,* 82 Or. 149; *Cauldwell v. Bingham & Shelley Co.,* 84 Or. 257; *Rorvik v. North Pacific Lbr. Co.,* 99 Or. 58; *McKay v. Pacific Bldg. Materials Co.,* 156 Or. 578.

Appellee seeks to have the rule of liberal interpretation of remedial statutes applied indirectly to its own benefit. The law, however, is otherwise. Since appellee prepared the contract in its own technical language, the contract will be construed strictly against it and liberally in favor of the insured. *Fenton v. Fidelity Casualty Co.,* 36 Or. 283; *Stringham v. Mutual Ins. Co.,* 44 Or.

447; *A. Jaloff v. United Auto Indemnity Exch.,* 120 Or. 381; *Purcell v. Wash. F. N. Ins. Co.,* 141 Or. 98. All ambiguous provisions must be construed in favor of coverage for the insured and against forfeiture. *Moore v. Aetna Life Ins. Co.,* 75 Or. 47; *Purcell v. Wash. F. N. Ins. Co.,* supra; *Bankers Life Co. v. Hollister* (Ore. 9th Cir.), 33 F. 2d 72.

The question here is not whether insured was liable as an employer, under the Employers' Liability Act, or otherwise, nor whether the benefits of a liberally construed Workmen's Compensation Law would have been extended to these employees. The precise question presented here is whether this employee was "engaged in the employment of the insured" within the meaning of a contract which must be construed strictly against the insurer.

This question has recently had the attention of the courts. In *Francis v. Scheper,* 326 Mich. 447, 40 N.W. 2d 217, judgment was obtained by the injured workman against the insured and the insurer was brought in as garnishee. The insurance company relied upon a clause which excluded coverage for injury or death of any "employee of the insured while engaged in the employment other than domestic of the insured." Thus the key words of the exclusion are exactly the same as in the case at bar. The facts were that the injured employee was employed by defendant as a painter. His hours were from 8:00 A.M. to 4:30 P.M. His pay was computed only within those periods but his employment agreement required the insured to furnish him

transportation to and from work. The employee was not, however, required to use the transportation furnished. The accident occurred at 4:40 or 4:45 P.M. when the employee was performing no service, but was simply riding home in the employer's truck. The trial court found that the employee "was not engaged in Houck's (the insured's) employment at the time of the accident." Garnishee insurance company appealed and contended there, as here, that holdings that such an injury would have been compensable under the Workmen's Compensation Act were controlling. The court rejected this contention saying (40 N.W. 2d 214, 217):

> "In the Konopka case, supra, we were considering the meaning of the words of the workmen's compensation act. In the instant case, we must consider the meaning of the exclusion clause in the policy of insurance and determine whether the words, *'engaged in the employment.' are applicable to an employee who has ceased the day's production and left the scene of his work and the hours were over for the work for which he was compensated.*
>
> "The phrase, 'engaged in the employment,' can fairly be construed as meaning, *active in the work plaintiff was employed and paid to do.* It was incumbent on defendant casualty company, who drafted the policy, in order to escape liability under the circumstances of this case, so to draft the policy as to make clear the extent of non-liability under the exclusion clause." (Italics ours)

Another decision upon quite similar facts is *B. & H. Passmore Co. v. New Amsterdam Casualty Co.* (3d Cir.), 147 F. 2d 536. The facts in that case were similar to the case at bar. Defendant insurance company re-

lied upon an exclusion relating to injuries sustained by "any employee of the insured while engaged in the business of the insured." The court held as a matter of law that the case was not within the exclusion, saying (147 F. 2d 536, 538, 539):

> "At the time of the accident Little was not engaged in any work and was not performing any service for Passmore and he was not receiving any pay for his time. He was simply riding from the place of work to Passmore's shop in a conveyance gratuitously furnished by Passmore. The Casualty Company relies upon decisions of the Oklahoma Supreme Court holding that an injury to an employee sustained while he is returning from work in a conveyance furnished by his employer is an injury 'arising out of and in the course of his employment.' But, in those decisions the Supreme Court was construing a provision of the Oklahoma Workmen's Compensation Law and not a private contract, and it has repeatedly held that such law is a remedial statute and should receive a liberal construction in favor of the injured employee.
>
> * * * *
>
> "Moreover the exclusion clause 'engaged in the business, * * * of the insured' differs materially from the clause 'arising out of and in the course of his employment.' The word 'engaged' connotes action. In Barnett v. Merchants' Life Ins. Co., supra (87 Okl. 42, 208 P. 272), the court, in construing a clause in the policy 'shall engage in military or naval service in time of war,' held that the word 'engage' denotes action and that it means to take part in by performing some duty.
>
> "In Head v. New York Life Ins. Co., 10th Cir., 43 F. 2d 517, 520, this court said: ' "Engage," is defined in volume 3 of Words and Phrases, Third Series, at page 258, as follows: " 'Engage' means to take part in or be employed in, however the em-

ployment may arise;" and at page 259 as follows: "To 'engage' is to embark in a business; to take a part; to employ or involve one's self; to devote attention and effort." ' "

In *Elliott v. Behner,* 150 Kan. 876, 96 P. 2d 852, on facts similar to the case at bar and involving an exclusion clause identical with that involved in the *Passmore* case, the Supreme Court of Kansas held the insurer liable and rejected the legal argument of the insurer which was based upon a Workmen's Compensation Act using the phrase "arising out of and in the course of employment." *Green v. Travelers Ins. Co.,* 286 N.Y. 358, 36 N.E. 2d 620, and *State Farm Auto Ins. Co. v. Skluzacek,* 208 Minn. 443, 294 N.W. 413, involved exclusions similar to the one involved in the *Passmore* case and similar facts. In both cases it was held that the exclusion did not apply.

For a case in which reasoning similar to the above cited cases was applied to somewhat different facts and in which cases involving Workmen's Compensation Laws were held not applicable between the insured and his liability insurer see *Lesser v. Great Lakes Casualty Co.,* 171 Or. 174.

Additional cases holding that the word "engage" connotes action in performing some duty, devoting attention and effort, are: *Benham v. American Central Life Ins. Co.,* 140 Ark. 612, 217 S.W. 462; *Barnett v. Merchants Life Ins. Co.,* 87 Okla. 42, 208 P. 271; *Head v. New York Life Ins. Co.,* 43 F. 2d 517; *Travelers Indemnity Co. v. Smith,* 190 Ark. 492, 79 S.W. 2d 1008; *The Alexander,* 60 F. 914; *Hobbs v. Penn. R. Co.,* 143

F. 180, 181; *Kelley v. Northwest Paper Co.,* 190 Minn. 291, 251 N.W. 274.

For a Washington case involving similar reasoning to the cases cited above see *Braley Motor Co. v. Northwest Casualty Co.,* 49 P. 2d 911. In this case the court points out (page 913) that in construing the language of an insurance policy it is a familiar rule that the construction will be adopted which is most favorable to the insured. The Court will find this same rule in practically all of the cases hereinbefore cited.

In all of the cases which we have cited the Court will see that there is a great distinction between "arising out of and within the course of the employment," and "engaged in the employment." Furthermore, there is a distinction in the cases as to whether a statute is being construed, particularly a remedial statute such as a workmen's compensation act, or whether it is an insurance contract being construed. The statutes are liberally construed in favor of compensation to the employee, while on the other hand, an insurance contract is strictly construed against the insurer and in favor of the insured.

We wish to call the Court's particular attention to the case of *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 277 P. 91, 286 P. 527, 291 P. 375, 62 A.L.R. 1447. In this case plaintiff was being gratuitously transported over defendant's logging railroad from Silverton, Oregon, to defendant's logging camp. The plaintiff had gone to Silverton for a few days and at the time of the injury was returning to camp where he intended to re-

sume work the following day. Plaintiff secured a judgment and defendant appealed, contending that the case was within the purview of the Oregon Workmen's Compensation Law. The judgment was affirmed and the court stated:

> "To bring a case within the protection of the Workmen's Compensation Act, the employee must show, as he was required to establish under the common law that he was, at the time of the injury, engaged in the employer's business, or in furthering that business, and that he was not doing something for his own benefit or accommodation."

The defendant petitioned for a rehearing. On rehearing the judgment was reversed. In a very exhaustive opinion by Justice Rossman, it was pointed out that the foregoing quoted statement was not a true statement of the law as applied to a Workmen's Compensation case. Justice Rossman stated (page 489):

> "It is true that when he was injured he was not *working for* the defendant, *but he was in its employ*. (Page 490) To say that plaintiff 'ceased' working for the defendant is not equivalent to saying that he severed the relation of employer and employee." (Italics ours)

At page 491 the court quotes with approval from an English case as follows:

> "It has been established by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operation of the workman has begun, and that it may continue to exist after the actual work has ceased."

The court points out the work may suspend and yet the employment continue. At page 492 the court quotes with approval from a Wisconsin case, as follows:

> "This court has held that the relation of master and servant extends beyond the hours a servant is actually required to labor and in some instances to places other than where the servant is employed."

We shall not attempt to cite all the cases on which the court relied in the *Silver Falls* case, as there are literally dozens of them, and most of them are to be found in the A.L.R. citations. However, it is quite apparent from the decisions that the Oregon Supreme Court is committed to the proposition that there is a vast distinction between the words "arising out of and within the course of the employment," and the words "engaged in the employment."

In the *Lamm v. Silver Falls* case, after it was reversed on rehearing, the plaintiff filed a petition for rehearing, and it came on for decision the third time. The Supreme Court, in another decision by Justice Rossman, adhered to the previous decision and held that the plaintiff could not sue his employer but could only recover compensation under the compensation act, and again pointed out that the injury arose out of the employment although the plaintiff was not "engaged in the employment" at the time of the injury.

In his petition for rehearing the plaintiff had contended that the court's decision was contrary to the decisions in some cases decided according to the common law rule prior to the enactment of the workmen's

compensation law. The court disposed of this contention in the following language:

> "We do not believe that it is essential that we should endeavor to harmonize our holding in the present case with the first three. The Workmen's Compensation Act endeavors to cast upon the industry the expense of the rehabilitation and relief of workmen injured during their participation in it. Its objective is more comprehensive than the principles which govern the common law action of negligence. * * * (p. 530)."

Plaintiff in *Lamm v. Silver Falls* relied upon the decision of the Washington Supreme Court in *Hama Hama Logging Co. v. Department of Labor and Industries,* 288 P. 655. The facts of the Washington case were substantially the same as those in the *Lamm* case. The Supreme Court of Washington held that under the circumstances the injured party was not entitled to compensation but could maintain an action for damages against his employer. The Oregon Court pointed out that in the case of *Wadnec v. Clemons Logging Co.* (Wash.), 263 P. 592, and *Bristow v. Department of Labor and Industries,* 246 P. 573, the Washington Supreme Court had held that an employee injured at the plant *though not engaged in the course of his employment,* was entitled to compensation. However, prior to the *Hama Hama* case, the Washington compensation act was amended so that at the time of the injury in the latter case the act limited relief to a workman "who is engaged in the employment" of an employer under the act. We submit that the decision of the Oregon Supreme Court in the *Lamm v. Silver Falls* case supports the position of the appellant here.

For another analogous situation, we call the Court's attention to the case of *Associated Indemnity Corporation v. Wachsmith* (Wash.), 99 P. 2d 420.

We should like to call the Court's attention also to the case of *Rickenbacker v. Layton, et al.,* 59 F. Supp. 156. The facts in the *Rickenbacker* case are substantially the same as the facts under consideration here, and the appellee Maryland Casualty Company was the insurance carrier in that case also. There was divergent testimony as to whether or not the plaintiff, at the time of his injury, was an "employee" of the insured. The defendant was relying upon an identical exclusion which the appellee seeks to assert here. The court disposed of the defendant's contention in the following language:

> "It is too well settled in South Carolina, to need the citation of authorities in support thereof, that in the construction of insurance contracts that meaning should be attributed to the language used which ordinarily is given to such language, unless it is susceptible of more than one reasonable construction, in which case it will be given that construction which is most favorable to the insured. Here the language of the policy excludes an employee of the insured from coverage only when such employee is actually engaged in the business of the insured. To say that a casual employee of the insured, who was not at the time of his injuries engaged in any business of the insured and had not been for two hours, is excluded from coverage would be to give the language of the policy a strained construction or else to resolve a possible ambiguity in favor of the insurer and against the insured. (page 163)"

In its trial brief appellee contended that the author-

ities are clear that where, as a part of the contract of employment, an employee is to be furnished transportation from one place of work to another place of work, such an employee is engaged in the employment of the employer while being thus transported.

In support of this proposition, appellee relied upon three cases. We shall point out to the Court that not a single one of these cases supports any such proposition.

In *Webb v. American Fire & Casualty Co.,* 149 Fla. 2, 5 S. 2d 252, the employee was engaged by the insured as a clerk under a contract and agreement by which she was to work as a clerk either in a store located at Deerfield, Florida, or another store located at Pompano, Florida, as and when her services should be required at either place, and that as compensation for her services she was to receive a stated weekly salary, was to be provided with room and board, and was to be transported to and from the store or stores where she was to work. On the day of the accident she was being transported from the store at Pompano to the store at Deerfield, from which she was to be transported to the place where she was furnished her board and room. The policy carried by the employer had an exclusionary clause in all material respects identical with the clause in issue here. There was an issue as to whether or not the injured employee was "engaged in the employment." The Florida court stated in one short paragraph that it was bound by its decisions in *Cohn v. Sloan,* 138 Fla. 752, 197 S. 14, and *Southern States Mfg. Co. v. Wright,* 200 S. 375.

An examination of the first of these two cases on which the *Webb* case is expressly predicated, indicates that in the *Cohn* case an employee was killed in an automobile accident while riding to her home town from another town where she had been taken by the employer. The *Cohn* case is a Workmen's Compensation Act case and merely holds that the accident "arose out of the employment."

In the *Southern States Mfg. Co.* case the employer furnished a truck for the convenience of plaintiff to and from the plant. He was hurt while being so conveyed. This was another Workmen's Compensation case, and the only issue was whether or not the accident "arose out of the employment." The court held that it did so arise and an award of compensation was upheld.

It thus become apparent that the Florida Supreme Court in the *Webb* case either (1) used the terms "arising out of the employment" and "engaged in the employment" as synonymous terms, or (2) the litigants made no distinction between the terms and no distinction was ever pointed out to the court.

When the *Webb* case is carefully read, and the cases on which it is expressly predicated are examined it is apparent that the case is absolutely no authority for the proposition that an employee injured while merely riding in a vehicle is "engaged in the employment of the employer."

An examination of the second case on which appellee relied in its trial brief indicates that it likewise is no authority for any such proposition. In *Gilmore v. Royal*

Indemnity Co., 24 Automobile Cases 1091 (Ohio), plaintiff was injured while being transported in insured's automobile. The insured's policy contained an exclusionary clause quite similar to the clause in question here. The court in its decision stated:

> "The facts bring plaintiff within the operation of the general rule that if an employee, while being conveyed to or from work in a conveyance furnished by the employer under either express or implied contract to so convey, suffers an injury during said journey *such injury arises within the course of the employment.*" (Italics ours)

Of course, appellant has conceded throughout the State Court and District Court proceedings that the injury "arose out of the employment." *That is not the issue here.* It is readily apparent that the Ohio court used these terms as synonymous terms or that the distinction was not pointed out to the court. As we have point out supra, the Oregon court has made a careful distinction in these terms. In any event, the Ohio case does not hold, and it is not authority for the proposition that a workman injured while being gratuitously transported to or from work, or to different places of work in an employer's conveyance is "engaged in the employment."

The only case which the appellee cited which might be even remotely considered to support its proposition is *State Farm Mutual Automobile Ins. Co. v. Brooks,* 136 F. 2d 807. However, the facts in that case are substantially different than the facts involved here, and the decision in the case must be read in the light of the facts

there involved. The policy-holder operated a fuel yard at Joplin, Mo. As a part of his business he secured wood from points outside of Joplin. The policy-holder hired two boys, who accepted temporary employment at the place where the wood was obtained to collect it and pile it for loading and transportation in the truck covered by the policy to insured's fuel yard at Joplin. Sometimes when the truck arrived from its last trip of the day at Joplin the two boys would help to unload it. It was understood between the employees and the policy-holder that they would be carried to and from the place where they collected and piled the wood to Joplin, a distance of 35 miles, as they had no other means of transportation. One boy was killed and the other seriously injured in an accident, and an action was brought for declaratory judgment by the insurance company against the policy-holder to determine its liability for the payment of a judgment on account of the accident. The policy contained an exclusion clause similar to the one in question here. The court held that the exclusion clause applied.

We think it sufficient to point out to the Court that in the *Brooks* case the injured party was required to ride a distance of 35 miles from where the wood was obtained to the point where the wood was to be unloaded, and after it arrived at the yard to unload it. The injured employee was paid by the day. The transportation to and from the collection yard and the fuel yard was an essential part of his work. He was not merely given free transportation but was actually paid for the time consumed during the ride. In addition he

had additional duties to perform after the truck arrived at the fuel yard. It would appear that there is a clear distinction between this case and the case at bar, where the decedent was paid on the commission basis and was merely riding in a conveyance gratuitously furnished by the employer.

It is always necessary to come back to the fundamental question of whether or not the injured party was performing the duties he was hired to perform at the time of the injury. We wish to call the Court's attention to a case involving a different type of insurance and a different type of exclusion clause, but which we believe is very well reasoned and presents an analogous situation. In *Barnett v. Merchants Life Ins. Co. of Des Moines, Iowa,* 208 P. 271, deceased had a policy of insurance which contained an exception to the effect that it was inapplicable if deceased died as a result of being "engaged in military service in time of war." Deceased contracted pneumonia while being transported on the high seas by the military, and the insurance company resisted payment on the ground that the decedent was "engaged in military service." It was clear that he was being transported as a Marine enlisted man, that the transportation was furnished by the military, that he had no other reasonable means of transportation, and that the pneumonia was contracted because of being transported on the high seas and while being so transported. Nevertheless, the Oklahoma Supreme Court held that the decedent was not "engaged in the military service" within the meaning of defendant's policy.

While a different type of policy was involved and a different exclusion was relied upon, we can see no fundamental distinction between the carrier in that case contending that the deceased was engaged in military service and the contention of appellee here that decedent was engaged in insured's employment.

Appellee in its trial brief also relied upon Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, page 718, Section 3995. An examination of this citation indicates that Blashfield sets out the rule as follows:

> "An employee is not engaged in the employer's business while riding home from work where the employer has not undertaken to furnish transportation, but where the employer has impliedly undertaken to furnish transportation, he is still an *employee* while riding from place of work." (Italics ours)

In a foot-note Blashfield cites *City of Wichita Falls v. Travelers Insurance Co.,* 137 S.W. 2d 170. In the case cited by Blashfield the City gave free transportation from the city barns to place of employment and return. Plaintiff was injured while being so transported and it was held that he was *an employee* when injured. It is thus clear (1) Blashfield does not say that where an employer has impliedly undertaken to furnish transportation the employee is engaged in the employment while riding from the place of work, but merely states that while so riding he is an "employee," which appellant has always conceded; and (2) the foot-note case merely holds that under such circumstances the workman is "an employee."

On the issue involved here it is possible to find a few cited cases which at first blush would appear to support the proposition that the worker being furnished gratuitous transportation is "engaged in the employment." However, when these cases are carefully examined it becomes quite clear that none of them expressly so holds. The great majority merely hold that where an employee is furnished free transportation and injured during the course of such transportation, the injury "arises out of the employment."

Furthermore, whatever the rule may be in some other jurisdiction, we submit that the law is well settled in the State of Oregon that under such a factual situation an employee is not "engaged in the employment."

No great citation of authorities is required on the general rule that the Federal courts are bound by the decisions of the courts of the states in which they sit on any substantive matter. See 35 C.J.S. (Federal Courts) Sec. 170, and cases cited therein. We earnestly submit that the district court is bound by the Oregon Supreme Court's decision in *Lamm v. Silver Falls Timber Co.,* supra, and *Varrelman v. Flora Logging Co.,* 133 Or. 541.

The court erred in concluding that at the time of the fatal accident decedent was "engaged in the employment of the insured" Kalahar.

THIRD SPECIFICATION OF ERROR

The trial court erred in concluding that the liability of the insured Kalahar to appellant was not covered by an automobile public liability policy issued by appellee to Kalahar (Conclusions of Law III, Tr. 61), for the reason that the exclusionary clause did not apply to plaintiff's decedent under the factual situation presented to the court.

ARGUMENT

As we have indicated in our argument directed to our First Specification of Error, the issue of whether or not decedent was "engaged in the employment" at the time of the fatal accident could not possibly be res judicata.

In the argument directed to our Second Specification of Error we have pointed out numerous cases and authorities, and in particular the Oregon cases to the effect that an employee who was being provided with gratuitous transportation and was injured during the course of such transportation, was not "engaged in the employment," since the employee is not engaged in any activity on behalf of the employer.

The appellant has recovered judgment in the State Court on account of the death of decedent. Appellee's only defense to the District Court action to effect collection of the judgment is the exclusionary clause of

the policy. Since this clause did not apply to decedent, the court erred in concluding that the liability of the insured (Kalahar) to appellant was not covered by the automobile public liability policy issued by appellee to Kalahar.

FOURTH SPECIFICATION OF ERROR

The Findings of Fact do not support the trial court's Conclusions of Law and Judgment upon the ground and for the reason that under the facts as stipulated it was contrary to law for the court to conclude that the issue of whether or not decedent was "engaged in the employment" of the assured was res judicata, or to conclude that in any event decedent was so "engaged."

ARGUMENT

The court's Findings of Fact of course are taken almost verbatim from the Pre-trial Order (Tr. 14). There has never been any dispute between appellant and appellee as to the essential facts.

We have endeavored to point out to the Court that under practically all of the reported cases where the facts are the same or similar, the authorities are quite uniform that an employee, injured while being gratuitously transported, is not "engaged in the employment." The cases which we have cited in this brief clearly indicate that under such a state of facts the trial court erred with reference to Conclusions of Law I, II, III and IV,

inclusive (Tr. 60, 61). It follows that the Findings of Fact do not support the Conclusions of Law.

We submit the judgment should be reversed.

Respectfully submitted,

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